

SATHIYAMURTHI

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v.

PENGUASA/KOMANDAN, PUSAT PEMULIHAN
KARANGAN, KEDAH

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FEDERAL COURT, PUTRAJAYA
ABDUL HAMID MOHAMAD FCJ
ARIFIN ZAKARIA FCJ
AUGUSTINE PAUL FCJ

[CRIMINAL APPEAL NO: 05-41-2005 (P)]
15 AUGUST 2006

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CRIMINAL PROCEDURE: *Habeas corpus - Detention of drug addict - Appellant ordered to undergo treatment at rehabilitation centre pursuant to s. 6(1)(a) Drug Dependents (Treatment and Rehabilitation) Act 1983 - Whether s. 399(1) Criminal Procedure Code applies to proceeding conducted by Magistrate in making an order under s. 6(1)(a) Act - Whether previous history of a drug dependant should be revealed to Magistrate in recommendation of Rehabilitation Officer*

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PREVENTIVE DETENTION: *Detention - Application for habeas corpus - Appellant ordered to undergo treatment at rehabilitation centre pursuant to s. 6(1)(a) Drug Dependents (Treatment and Rehabilitation) Act 1983 - Whether s. 399(1) Criminal Procedure Code applies to proceeding conducted by Magistrate in making an order under s. 6(1)(a) Act - Whether previous history of a drug dependant should be revealed to Magistrate in recommendation of Rehabilitation Officer*

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STATUTORY INTERPRETATION: *Construction of statutes - Literal approach - Whether s. 399(1) Criminal Procedure Code applies to proceeding conducted by Magistrate in making an order under s. 6(1)(a) Drug Dependents (Treatment and Rehabilitation) Act 1983 - Language of statute*

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The appellant in this appeal was ordered by the learned Magistrate to undergo treatment and rehabilitation at the Pusat Pemulihan Karangan, Kedah for a period of two years pursuant to s. 6(1)(a) of the Drug Dependents (Treatment and Rehabilitation) Act 1983 ('Act'). Before making the order, the learned magistrate considered the report of the medical officer and the recommendation of the Rehabilitation Officer. The appellant subsequently filed a writ of *habeas corpus* in the High Court seeking his release. The High Court's dismissal of that application

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- A resulted in the present appeal. The issues requiring determination were: (i) whether s. 399(1) of the Criminal Procedure Code ('s. 399(1)') applies to a proceeding conducted by a Magistrate in making an order under s. 6(1)(a) of the Act; and (ii) whether the previous history of a drug dependant should be revealed to the
- B Magistrate in the recommendation of the Rehabilitation Officer in such a proceeding. The appellant contended that the report of the medical officer ought to have been served on him pursuant to s. 399(1) whereas the learned Deputy Public Prosecutor submitted that s. 399(1) applies to only inquiries conducted under the
- C Criminal Procedure Code. The appellant's objection to his previous history being revealed to the Magistrate in the recommendation of the Rehabilitation Officer stemmed from the repeal of s. 6(4) of the Act as enacted pursuant to which the Magistrate, in making an order under s. 6(1), is to have regard to the circumstances of
- D the case, and the character, antecedents, age, health, education, employment, family and other circumstances of the person against whom the order is proposed to be made. Thus, the appellant argued, the repeal of this provision meant that such information should not be revealed to the Magistrate.

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Held (dismissing the appeal)
Per Augustine Paul FCJ:

- (1) The proceeding conducted under s. 6(1) of the Act was no doubt an inquiry and the validity of the objection raised by the
- F appellant would thus depend on whether this inquiry came within the scope of s. 399(1). The applicability of s. 399(1) to a particular proceeding is made patently clear by its explicit language. It states that a report "... may be given in evidence in any inquiry, trial or other proceeding under this Code ...".
- G The words "... or other proceeding ..." are followed by the words "... under this Code". The question for determination is whether this qualification is confined in its operation to just "... or other proceeding ..." or also includes "... any inquiry, trial ...".
- H The rule of construction makes it clear that the absence of a comma before the words "... or other proceeding ..." means that the words "... under this Code ..." must be construed conjunctively as applying to all the three categories of proceedings mentioned. Section 399(1) thus applies to only inquiries, trials or other proceedings under the Criminal
- I Procedure Code. The inquiry conducted by the Magistrate

pursuant to s. 6(1) of the Act was one conducted under the provisions of the Act and not the Criminal Procedure Code. Section 399(1) thus had no application to such an inquiry. (para 10)

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- (2) A recommendation of a Rehabilitation Officer must be supported with reasons as it is only then that a Magistrate will be able to decide whether to make the order as recommended, or, under the alternative limb of s. 6(1) of the Act. The repeal of s. 6(3) and (4) as originally enacted does not alter this requirement. Under the law as it then stood, the previous history of a person will be contained in a report of the Rehabilitation Officer which the Magistrate must consider before making the appropriate order after having heard the representation of the person, if any. Under the law as it now stands, the Magistrate acts on the recommendation of the Rehabilitation Officer. It is the duty of the Magistrate to ensure that the recommendation of the Rehabilitation Officer is justified in order to enable him to weigh it with the representation, if any, of the person against whom the order is sought to be made. Thus, the repeal of s. 6(4) of the Act as enacted does not alter the duty of the Rehabilitation Officer to provide relevant information to the Magistrate in support of his recommendation. It must, however, be observed that it is the absence of the previous history of a person in the recommendation of the Rehabilitation Officer that must be the subject-matter of complaint, and not its presence. (para 12)

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- (3) The objections raised by the appellant had a bearing on the right of representation and were, therefore, relevant. However, they had no merit. (para 13)

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Bahasa Malaysia translation of headnotes

Perayu dalam rayuan ini telah diperintah oleh yang arif Majisteret untuk menjalani rawatan dan pemulihan di Pusat Pemulihan Karangan, Kedah untuk tempoh dua tahun di bawah s. 6(1)(a) Akta Penagih Dadah (Rawatan dan Pemulihan) 1983 ('Akta'). Sebelum membuat perintah, yang arif Majisteret telah meneliti laporan pegawai perubatan serta syor-syor yang dibuat oleh Pegawai Pemulihan. Berikutnya perayu memfail writ *habeas corpus* di Mahkamah Tinggi memohon pembebasan dirinya. Mahkamah Tinggi menolak permohonan sekaligus mencetuskan rayuan di sini. Isu-isu yang menuntut keputusan adalah: (i) sama ada s. 399(1)

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- A Kanun Prosedur Jenayah ('s. 399(1)') terpakai kepada prosiding yang dijalankan oleh Majisteret sewaktu membuat perintah di bawah s. 6(1)(a) Akta; dan (ii) sama ada sejarah silam seorang penagih dadah boleh didedahkan kepada Majisteret oleh Pegawai Pemulihan melalui syor yang dibuat olehnya di prosiding tersebut.
- B Perayu berhujah bahawa berdasarkan s. 399(1) laporan pegawai perubatan harus dibuat penyerahannya kepada beliau, sementara yang arif Timbalan Pendakwa Raya mengatakan bahawa s. 399(1) terpakai hanya kepada siasatan yang dijalankan di bawah Kanun Prosedur Jenayah. Bantahan perayu terhadap pendedahan sejarah silamnya kepada Majisteret melalui syor Pegawai Pemulihan adalah berpunca dari pemansuhan s. 6(4) Akta, di mana Majisteret, dalam membuat perintah di bawah s. 6(1), dikehendaki mengambilkira halkeadaan kes, kelakuan, peristiwa-peristiwa lalu, umur, kesihatan, pembelajaran, pekerjaan, keluarga serta lain-lain hal yang menyangkut orang yang perintah hendak dibuat terhadapnya. Menurut perayu, pemansuhan peruntukan ini bermakna maklumat-maklumat berkenaan tidak seharusnya didedahkan kepada Majisteret.
- E **Diputuskan (menolak rayuan)**
Oleh Augustine Paul HMP:
- (1) Prosiding yang dijalankan di bawah s. 6(1) Akta tanpa syak lagi adalah satu siasatan dan dengan itu kesahan bantahan perayu akan bergantung kepada sama ada siasatan ini dirangkumi oleh
- F skop s. 399(1). Keterpakaian s. 399(1) kepada sesuatu prosiding dijelaskan oleh bahasanya yang jelas. Ia menyatakan bahawa satu laporan "... boleh diberi sebagai keterangan dalam mana-mana siasatan, perbicaraan atau lain-lain prosiding di bawah Kanun ini ...". Perkataan "... atau lain-lain prosiding
- G ..." adalah diikuti dengan perkataan "... di bawah Kanun ini". Soalan yang perlu dijawab adalah sama ada syarat ini terpakai hanya kepada "... atau lain-lain prosiding ..." atau merangkumi juga "... mana-mana siasatan, perbicaraan ...". Kaedah tafsiran menjelaskan bahawa ketiadaan tanda koma sebelum ungkapan
- H "... atau lain-lain prosiding ..." bermakna bahawa perkataan "... di bawah Kanun ini ..." mestilah ditafsirkan secara conjunctive sebagai terpakai kepada ketiga-tiga kategori prosiding yang disebutkan. Seksyen 399(1) dengan itu terpakai
- I hanya kepada siasatan, perbicaraan atau lain-lain prosiding di bawah Kanun Prosedur Jenayah. Siasatan yang dijalankan oleh

Majisteret di bawah s. 6(1) Akta adalah siasatan yang dijalankan di bawah peruntukan Akta bukannya Kanun Prosedur Jenayah. Oleh itu s. 399(1) tidak terpakai kepada kepada siasatan yang sedemikian.

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- (2) Syor oleh Pegawai Pemulihan perlu disokong oleh alasan-alasan kerana dengan cara itu sahaja Majisteret boleh menimbang sama ada untuk membuat perintah seperti yang disyorkan, ataupun bertindak di bawah jejari alternatif s. 6(1) Akta. Pemansuhan peruntukan asal s. 6(3) dan (4) tidak mengubah syarat ini. Di bawah undang-undang sepertimana ianya wujud ketika itu, sejarah silam seseorang akan dimasukkan ke dalam laporan Pegawai Pemulihan dan akan dipertimbang oleh Majisteret sebelum membuat perintah yang sewajarnya setelah mendengar apa-apa representasi orang tersebut, jika ada. Di bawah undang-undang yang wujud kini, Majisteret bertindak atas syor Pegawai Pemulihan. Adalah menjadi tanggungjawab Majisteret untuk menentukan bahawa syor Pegawai Pemulihan adalah berjustifikasi sebelum menimbangkannya bersekali dengan representasi orang kepada siapa perintah mohon dibuat, jika ada. Dengan itu, pemansuhan s. 6(4) Akta seperti yang digubal tidak mengubah tanggungjawab Pegawai Pemulihan untuk mengemukakan maklumat-maklumat relevan kepada Majisteret sebagai menyokong syornya. Apapun, perlu diperhatikan bahawa yang menjadi pokok bantahan adalah ketiadaan sejarah silam seseorang di dalam syor Pegawai Pemulihan, bukan kewujudannya.

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- (3) Bantahan yang dibangkitkan oleh perayu mempunyai kaitan dengan hak representasi dan dengan itu adalah relevan. Bagaimanapun, ia tidak bermerit.

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Case(s) referred to:

Ang Gin Lee v. PP [1991] 1 MLJ 498 (*refd*)

Karam Singh v. Menteri Hal Ehwal Dalam Negeri, Malaysia [1969] 2 MLJ 129 (*refd*)

PP v. Ottavio Quattrocchi [2003] 1 CLJ 557 HC (*refd*)

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R v. Home Secretary, Ex parte Greene [1941] 3 All ER 104 (*refd*)

Rajasegaran v. Pusat Pemulihan Serenti Raub & Anor [2000] 7 CLJ 216 HC (*refd*)

Re Bowyer [1930] 66 OLR 378 (*refd*)

Re Carnochan [1941] SCR 470 (*refd*)

Re Gibson [1907] 15 OLR 245 (*refd*)

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Re King [1916] 30 DLR 599 (*refd*)

- A *Re Shuttleworth* [1846] 9 QB 651 (*refd*)
Re Tan Boon Liat [1977] 2 MLJ 108 (*refd*)
Prithipal Singh v. Datuk Bandar, Kuala Lumpur (Golden Arches Restaurant Sdn Bhd, Intervener) [1993] 3 MLJ 336 (*refd*)
- Legislation referred to:**
- B Courts of Judicature Act 1964, para 1
Criminal Procedure Code, s. 399(1)
Drug Dependants (Treatment and Rehabilitation) Act 1983, s. 6(1)(a),
(b), (3), (4)
Drug Dependants (Treatment and Rehabilitation) (Amendment) Act
- C 1998, s. 6(1)
- Other source(s) referred to:**
RJ Sharpe, *The Law of Habeas Corpus*, 2nd edn, p 57
- For the appellant - RSN Rayer (Rafael Prabakaran Abdullah with him);*
D *M/s R Nethaji Rayer & Co*
For the respondent - Najib Zakaria
- [Appeal from High Court, Pulau Pinang; Criminal Application No: 44-6-2005]*
- E *Reported by Suresh Nathan*

JUDGMENT

- F **Augustine Paul JCA:**
- [1] The issues that arose for consideration in this appeal were the applicability of s. 399(1) of the Criminal Procedure Code (“s. 399(1)”) to a proceeding by a Magistrate in ordering a drug dependant to undergo treatment and rehabilitation at a
- G Rehabilitation Centre pursuant to s. 6(1)(a) of the Drug Dependants (Treatment and Rehabilitation) Act 1983 (“the Act”) and whether the previous history of a drug dependant should be revealed to the Magistrate in the recommendation of the Rehabilitation Officer in such a proceeding.
- H [2] On 21 October 2004 the learned Magistrate, Magistrates Court, Georgetown, Pulau Pinang ordered the appellant to undergo treatment and rehabilitation at the Pusat Pemulihan Karangan, Kedah for a period of two years under s. 6(1)(a) of the
- I Act. Before making the order the learned Magistrate considered the report of the medical officer and the recommendation of the Rehabilitation Officer. The material parts of the medical report read as follows:

Saya Dr Latifah bt Ishahak @ Ishak, Pegawai Perubatan, Klinik Kesihatan Hospital Pulau Pinang Seorang * Pegawai Perubatan Kerajaan/pengamal perubatan berdaftar, setelah menjalankan ujian-ujian yang perlu keatas Sathiyamurthi A/L Arokiadass Anthony Kad Pengenalan No: 500406-07-5565 Berumur 54 Tahun yang beralamat di Blok 19-4-2, Lorong Batu Bukit, Tg. Tokong, Pg memperakui bahawa dia * ialah/bukanlah seorang penagih dadah mengikut pengertian Akta ** Dadah/dadah-dadah berbahaya yang digunakan yang menyebabkan dia menjadi penagih dadah ialah MORPHINE.

Tarikh: 5 OCT 2004

The material parts of the recommendation of the Rehabilitation Officer read as follows:

2. Sejarah Penggunaan Dadah

2.1 Jenis Dadah: Morfin (chase) Sekali sehari

2.2 Lama Menggunakan Dadah: Sejak 1975 (morfin)/terlibat semula sehari

3. Rekod Memulihan

Bil	Jenis Perintah	Tempat	Tempoh
1	Sek 6(1)(b) APD	Pejabat Pemulihan Dadah, Daerah Timur Laut, Pulau Pinang	21.08.89-20.08.91
2	Sek 6(1)(b) APD	Pejabat A.D.K., Daerah Timur Laut, Pulau Pinang	25.02.99-24.02.01
3	Sek 6(1)(a) APD	Pusat Serenti Batu Kurau	05.06.01-02.07.02

4. Syor Pegawai Pemulihan Dadah

Penama berumur 54 tahun, telah berkahwin dan belum mempunyai anak lagi. Isterinya bekerja sebagai pekerja pembersihan dengan pendapatan RM600/= sebulan. Beliau merupakan anak ketiga dari empat orang adik-beradik. Kedua-dua ibubapa penama telah meninggal dunia. Beliau kini tinggal bersama isterinya di rumah sewanya di Tanjung Tokong, Pulau Pinang.

- A Penama menerima pendidikan setakat tamat darjah 6 dan kini bekerja sebagai pengawal keselamatan dengan pendapatan RM1,000 sebulan.
- B Beliau mengaku terlibat semula dengan pengambilan dadah jenis morfin selama sehari dengan kekerapan sekali sehari. Menurut penama, beliau mula mengambil dadah jenis yang sama pada 1975 dan pernah diletakkan di bawah pengawasan Pejabat Agensi Dadah Kebangsaan, Daerah Timur Laut, Pulau Pinang dari 25.2.99 hingga 24.2.2001 sebelum dimasukkan ke Pusat Serenti Batu Kurau pada 2001. Sepanjang tempoh pengawasan selepas pembebasannya dari pusat, penama kurang respon dan pernah dituduh langgar syarat pengawasan kerana terlibat semula dengan dadah. Selain dari itu, penama juga mengaku pernah dipenjarakan sebanyak 5 kali lagi kerana kesalahan memiliki dadah.
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- D Memandangkan penglibatan penama dengan dadah telah lama dan masih tidak menampakkan kesungguhannya untuk berhenti darinya, maka disyorkan penama dihantar semula ke pusat serenti untuk pemulihan di bawah Sek 6(1)(a) Akta Penagih Dadah (R & P) 1983 (Pindaan) 1998.
- E On 18 January 2005 the appellant filed a writ of *habeas corpus* in the High Court at Penang seeking his release. The application was dismissed by the High Court on 9 May 2005. This appeal is by the appellant.
- F [3] Before us learned counsel for the appellant rested his case on two issues only. They are:
- G (a) whether s. 399 applies to an inquiry conducted by a Magistrate in making an order under s. 6(1) of the Act; and
- (b) whether the previous history of the appellant should be revealed to the Magistrate in the recommendation of the Rehabilitation Officer
- H In order to appreciate the arguments of learned counsel and the reply by the learned Deputy Public Prosecutor it is necessary to consider s. 6(1) of the Act as originally enacted in 1983 and as amended by the Drug Dependents (Treatment and Rehabilitation) (Amendment) Act 1998.
- I [4] Section 6(1) of the Act as originally enacted reads as follows:

6 (1) Where a person who has undergone the tests referred to in section 3 or 4, and, in consequence of such test, is certified by a government medical officer or a registered medical practitioner to be a drug dependant, the officer shall produce him, or cause him to appear before a Magistrate and if the Magistrate, after giving such person an opportunity to make representations:

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(a) is satisfied that such person requires to undergo treatment and rehabilitation at a Rehabilitation Centre, order such person to reside at such Centre for a period of two years to undergo treatment and rehabilitation and thereafter to undergo after-care in accordance with the provisions of this Act relating thereto; or

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(b) is satisfied that such person's treatment and rehabilitation may be carried out otherwise than at a Rehabilitation Centre, he may order such person to be placed under the supervision of a Rehabilitation Officer for a period of not less than two and not more than three years, and to execute a bond with or without sureties, as the Magistrate may determine, to remain under such supervision for such period.

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Provided that where such person fails to execute such bond an order under paragraph (a) shall be made against him by the Magistrate.

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(2) An order of supervision under paragraph (b) of subsection (1) shall contain the condition requiring such person to abstain from dangerous drugs and may contain conditions as to residence, employment, associations, abstention from intoxicating liquor, or attendance at a Day Centre.

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(3) The Magistrate shall, before making an order either under paragraph (a) or (b) of subsection (1), consider a report by a Rehabilitation Officer on such person, a copy of which shall be supplied to such person, and which shall be read out and explained to him.

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(4) In making an order under subsection (1), the Magistrate shall have regard to the circumstances of the case, and the character, antecedents, age, health, education, employment, family and other circumstances of the person against whom the order is proposed to be made.

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(5) A certificate under subsection (1) purporting to be signed by a government medical officer or a registered medical practitioner shall be receivable by a Magistrate without proof of the signature thereon, and the Magistrate shall accept it as proof of its contents, unless the contrary is proved.

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A [5] Section 6(1) of the Act as amended which is now in force reads as follows:

B 6 (1) Where a person who has undergone the tests referred to in section 3 or 4 and, in consequence of such tests, is certified by a government medical officer or a registered medical practitioner to be a drug dependant, the officer shall produce him, or cause him to appear before a Magistrate, and the Magistrate shall upon the recommendation of a Rehabilitation Officer and after giving such person an opportunity to make representations:

C (a) order such person to undergo treatment at a Rehabilitation Centre specified in the order for a period of two years and thereafter to undergo supervision by an officer at the place specified in the order for a period of two years; or

D (b) order such person to undergo supervision by an officer at the place specified in the order for a period of not less than two and not more than three years.

E (2) An order of supervision imposed on a person under paragraphs (a) and (b) of subsection (1) shall contain the following conditions:

(a) the person must reside in a State or Federal Territory or any area as specified in the order;

F (b) the person must not leave the area where he resides without the written permission of the Director General;

(c) at the time specified in the order, the person shall report at the nearest police station or for a member of the armed forces at the place specified by an officer;

G (d) the person shall not consume, use or possess any dangerous drugs;

(e) the person shall undergo such tests at such time and place as may be ordered by an officer; and

H (f) the person shall undergo any programme for the rehabilitation of drug dependants held by the Government.

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(3) Any person undergoing supervision under paragraph (a) or (b) of subsection (1) who fails to comply with any condition imposed under subsection (2) shall be guilty of an offence and shall on conviction be liable to be punished with imprisonment for a period not exceeding three years or to whipping not exceeding three strokes or to both.

[6] The paramount consideration in an application for a writ of *habeas corpus* by a person against whom a rehabilitation order has been made is whether there is justification for the making of the order. It has been said that sometimes the court may exercise its inherent jurisdiction to ignore a defect in a detention order where it appears that the detenu is a person who, on the merits, ought to be detained (see *The Law of Habeas Corpus* by RJ Sharpe (2nd edn) at p 57). This may arise in cases where the order made is one that is in the interests of society in general, and, the person concerned in particular. This line of thinking is illustrated by cases involving persons confined on account of mental disorder. As Lord Denman CJ said in *Re Shuttleworth* [1846] 9 QB 651 at p 662:

If the court thought that a party, unlawfully received or detained, was a lunatic, we should still be betraying the common duties of members of society if we directed a discharge. But we have no power to set aside the order, only to discharge. And should we, as Judges, or individuals, be justified in setting such a party at large? It is answered that there may be a fresh custody. But why so? Is it not better, if she be dangerous, that she should remain in custody till the Great Seal or the commissioners act? Therefore, being satisfied in my own mind that there would be danger in setting her at large, I am bound by the most general principles to abstain from so doing; and I should be abusing the name of liberty if I were to take off a restraint for which those who are most interested in the party ought to be the most thankful.

In Canada where a similar approach has been adopted it has been held that the appropriate procedure to be followed is to direct the trial of an issue as to the patient's propensity to be dangerous (see *Re Gibson* [1907] 15 OLR 245; *Re King* [1916] 30 DLR 599; *Re Bowyer* [1930] 66 OLR 378 and *Re Carnochan* [1941] SCR 470). Similarly it would be an injustice to society and to the drug dependant himself if he is discharged from the rehabilitation centre on technical grounds without any concern for his treatment. The question of whether this objective can be a matter for consideration in a writ of *habeas corpus* by a person against whom a rehabilitation order has been made would depend on the circumstances in which the order can be challenged.

- A [7] In order to answer this question it is first necessary to ascertain the instances when a writ of *habeas corpus* will be issued. In *Re Tan Boon Liat* [1977] 2 MLJ 108 Lee Hun Hoe CJ (Borneo) said at pp 110-111:
- B In *The Reverend Thomas Pelham Dale's Case* [1881] 6 QBD 376, 461, 469 and 470 Brett LJ observed at page 461 that:
- C Then comes the question upon the *habeas corpus*. It is a general rule, which has always been acted upon by the Courts of England, that if any person procures the imprisonment of another he must take care to do so by steps, all of which are entirely regular, and that if he fails to follow every step in the process with extreme regularity the court will not allow the imprisonment to continue.
- D Cotton LJ in supporting this stated at page 469:
- E I quite agree with Brett LJ, that when persons take upon themselves to cause another to be imprisoned, they must strictly follow the powers under which they are assuming to act, and if they do not, the person imprisoned may be discharged, although the particulars in which they have failed to follow those powers may be matters of mere form. Here, however, the departure from the correct procedure is not, in my opinion, a mere matter of form, but is a matter of substance.
- F Thus in a writ of *habeas corpus* the question for the court to determine is whether the person is lawfully detained. If he is, the writ cannot be issued and if he is not, it must be issued (see *R v. Home Secretary, Ex parte Greene* [1941] 3 All ER 104). The lawfulness of a detention would depend upon whether the breach
- G complained of is mandatory or directory. A mandatory requirement is one that is of direct relevance to the detention. A breach of it will entitle a person to a writ of *habeas corpus* without the need to establish prejudice. A breach of a requirement which is directory will not be significant provided that there is substantial compliance and there is no prejudice. In the case of an order made under
- H s. 6(1) of the Act the requirements that must be complied with are:
- I (i) certification by a medical officer that the subject is a drug dependant.
- (ii) the recommendation of a Rehabilitation Officer, and

(iii) the giving of an opportunity to the subject to make representation.

All these three requirements relate to the condition of a person as a drug dependant and are prerequisites to the exercise of power by a Magistrate. They are therefore mandatory. The resultant matter for consideration is the extent to which a court may inquire into compliance with these requirements. That would depend on the manner of exercise of powers by a Magistrate under s. 6(1) of the Act. Where the order is required to be made on the satisfaction of a Magistrate the question of whether or not the facts on which the rehabilitation order is made are sufficient or relevant is a matter to be decided solely by the Magistrate and cannot be subjected to judicial review (see *Karam Singh v. Menteri Hal Ehwal Dalam Negeri, Malaysia* [1969] 2 MLJ 129). That in fact was the position in the case of s. 6(1) of the Act as originally enacted whereby a Magistrate may make an order "... if satisfied that such person requires to undergo treatment and rehabilitation at a Rehabilitation Centre ...". The test under s. 6(1) of the Act as amended is now no longer subjective. It is now objective since the Magistrate, under s. 6(1) of the Act, "... shall upon the recommendation of a Rehabilitation Officer ... order such person to undergo treatment at a Rehabilitation Centre ...; or order such person to undergo supervision". It is therefore mandatory for the Magistrate to make an order either under s. 6(1)(a) or (b) of the Act upon the recommendation of the Rehabilitation Officer. The existence of grounds upon which a Magistrate shall make the order is subject to judicial review as the test is objective. It follows that the grounds upon which an order made by a Magistrate under s. 6(1) of the Act can be impugned are when there is a failure to comply with the three requirements as set out earlier. Thus the language of s. 6(1) of the Act itself contemplates the use of a writ of *habeas corpus* only for the purpose of challenging the condition of a person as a drug dependant. This satisfies the social requirement of issuing a writ of *habeas corpus* in cases of this nature. It is perhaps pertinent to add that in *Rajasegaran v. Pusat Pemulihan Serenti Raub & Anor* [2000] 3 MLJ 529 the High Court acted under para 1 of the Schedule to the Courts of Judicature Act 1964 to substitute an order made under s. 6(1)(a) of the Act to one under s. 6(1)(b) of the Act.

A [8] It is now apposite to consider the two objections raised by learned counsel.

(a) Whether s. 399(1) Applies To An Inquiry Conducted By The Magistrate In Making An Order Under s. 6(1) Of The Act

B [9] Learned counsel contended that the report of the medical officer ought to have been served on the appellant pursuant to s. 399(1). In reply the learned Deputy Public Prosecutor referred to the case of *Ang Gin Lee v. PP* [1991] 1 MLJ 498 and said that s. 399(1) applies to only inquiries conducted under the Criminal Procedure Code.

C [10] In the light of the objection raised it is necessary to consider s. 399(1). It reads as follows:

D Any document purporting to be a report under the hand of any of the person mentioned in subsection (2) of this section upon any person, matter or thing examined or analysed by him or any document purporting to be a report under the hand of the Registrar of Criminals upon any matter or thing relating to finger impressions submitted to him for report may be given in evidence

E in any inquiry, trial or other proceeding under this Code unless such person or Registrar shall be required to attend as a witness:

(a) by the Court; or

F (b) by the accused, in which case the accused shall give notice to the Public Prosecutor not less than three clear days before the commencement of the trial:

Provided always that in any case in which the Public Prosecutor intends to give in evidence any such report he shall deliver a copy thereof to the accused not less than ten clear days before the commencement of the trial.

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H The proceeding conducted under s. 6(1) of the Act is no doubt an inquiry. The validity of the objection raised by learned counsel would thus depend on whether this inquiry comes within the scope of s. 399(1). The applicability of s. 399(1) to a particular proceeding is made patently clear by its explicit language. It states that a report "... may be given in evidence in any inquiry, trial or other proceeding under this Code" The words "... or other proceeding ..." are followed by the words "... under this Code".

I The question for determination is whether this qualification is confined in its operation to just "... or other proceeding ..." or also includes "... any inquiry, trial ...". The rule of construction

applied in cases such as *PP v. Ottavio Quattrocchi* [2003] 1 CLJ 557 and *Prithipal Singh v. Datuk Bandar, Kuala Lumpur (Golden Arches Restaurant Sdn Bhd, Intervener)* [1993] 3 MLJ 336 makes it clear that the absence of a comma before the words "... or other proceeding ..." means that the words "... under this Code ..." must be construed conjunctively as applying to all the three categories of proceedings mentioned. Section 399(1) thus applies to only inquiries, trials or other proceedings under the Criminal Procedure Code. The inquiry conducted by the Magistrate pursuant to s. 6(1) of the Act is one conducted under the provisions of the Act and not the Criminal Procedure Code. Section 399(1) thus has no application to such an inquiry.

(b) Whether The Previous History Of The Appellant Should Be Revealed To The Magistrate In The Recommendation Of The Rehabilitation Officer

[11] The objection of learned counsel to the previous history of the appellant being revealed to the Magistrate in the recommendation of the Rehabilitation Officer stems from the repeal of s. 6(4) of the Act as enacted pursuant to which the Magistrate, in making an order under s. 6(1) is to have regard to the circumstances of the case, and the character, antecedents, age, health, education, employment, family and other circumstances of the person against whom the order is proposed to be made. Thus, learned counsel contended, the repeal of this provision means that such information should not be revealed to the Magistrate.

[12] It is clear that the recommendation of a Rehabilitation Officer plays a dominant role in the exercise of powers by a Magistrate under s. 6(1) of the Act. It is the recommendation of a Rehabilitation Officer that empowers a Magistrate to decide whether to order a person to undergo treatment at a Rehabilitation Centre under s. 6(1)(a) of the Act or to order such person to undergo supervision by an officer under s. 6(1)(b) of the Act. Such a decision cannot be made on a mere recommendation of the Rehabilitation Officer that a certain order must be made. As *Black's Law Dictionary* 6th edn in defining the phrase "letter of recommendation" says:

A writing whereby one person certifies concerning another that he is of good character, solvent, possessed of commercial credit, skilled in his trade or profession, or otherwise worthy of trust, aid, or employment. It may be addressed to an individual or to whom it may concern, and is designed to aid the person commended in obtaining credit, employment, etc.

- A It follows that a recommendation must be supported with reasons. This is necessary as it is only with reasons that a Magistrate will be able to decide whether to make the order as recommended, or, under the alternative limb of s. 6(1) of the Act. The repeal of s. 6(3) and (4) as originally enacted does not alter this requirement.
- B Under the law as it then stood the previous history of a person will be contained in a report of the Rehabilitation Officer which the Magistrate must consider before making the appropriate order after having heard the representation of the person, if any. Under the law as it now stands the Magistrate acts on the recommendation of the Rehabilitation Officer. It is the duty of the Magistrate to ensure that the recommendation of the Rehabilitation Officer is justified in order to enable him to weigh it with the representation, if any, of the person against whom the order is sought to be made. Thus the repeal of s. 6(4) of the Act as enacted does not alter the duty of the Rehabilitation Officer to provide relevant information to the Magistrate in support of his recommendation. It must, however, be observed that it is the absence of the previous history of a person in the recommendation of the Rehabilitation Officer that must be the subject-matter of complaint, and not its presence.
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[13] The objections raised by learned counsel have a bearing on the right of representation and are therefore relevant. However, they had no merit. In the upshot we dismissed the appeal.

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